No. 12,903

In The United States Court of Appeals

For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY,

Appellant,

vs.

GEORGE M. MELTON,

Appellee.

Brief of Appellee

LEONARD A. SCHULZ,
Dillon, Montana;

H. L. MAURY,
Butte, Montana;

A. G. SHONE,
Butte, Montana,
Attorneys for Appellee.

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SUPPLEMENTAL STATEMENT OF THE CASE

The allegations of the complaint that the shipment was not accompanied by appellee, or his agents, and that it was entirely in the custody, control and management of appellant from the time of loading at Kevin until the time of unloading at Wickes are admitted by defendant's answer. R. 11.

ARGUMENT

The trial court correctly held that there was no special contract.

We do not think that the case is so complicated or difficult of decision as is foreshadowed in the appellant's brief. The shipment was not one in interstate commerce.

The evidence shows that from Kevin to Wickes the Railroad is entirely inside of the limits of Montana. The Montana statute, Section 8-812, R. C. M., 1947, is correctly copied on page 19 of the brief.

On page 27 thereof appellant quotes a statutory exception:

> "The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract."
>
> Section 8-707, R. C. M., 1947.

There is nothing special about this contract. There was no reduction in the freight charge, and no other consideration for any special contract. The complaint, R. 4, has the following words in paragraph 3:

> "* * * for the plaintiff had agreed before the delivery of the said sheep to defendant that he would pay the freight charges on them demanded by the defendant, and usually charged by the defendant."

In the answer of the defendant, these allegations of paragraph 3 are admitted. R. 11.

The Court will note the word "special" in the foregoing statute. A special contract must always be express. It is something different from an ordinary contract, and it is in the case of the carrier necessary that there be a cheaper rate than the ordinary freight charged other persons for the same service. It would seem to us that there can be no cheaper rates allowed to any customer by any road engaged in interstate commerce under the Acts of Congress in existence for 30 years or more. No interstate commerce carrier would dare plead that it had

given a different rate to any particular shipper, except what the general public paid for the same service. 35 or 40 years ago special contracts could be entered into by carriers, and reductions in freight given. If the Court is interested in the ancient law, which is against this contract's here being a special contract, we cite:

Ward v. Mo. Pac. Ry. Co., 58 S. W. 28-158, Mo. 226;

Indianapolis Coal and Traction Co. v. Dalton, 87 N. E. 552-43 Ind. App. 330;

Jackson v. Creek, 94 N. E. 416; 47 Ind. App. 541.

On page 26 of the brief, counsel calls the two exhibits to the answer "uniform livestock contracts." A form for a uniform livestock contract seems to us to imply that the exhibits are in the same form as contracts which are between shippers generally and customarily over the Great Northern Railway, and there is, according to the brief of counsel, nothing special about this contract.

Likewise, to get inside of the exception to the general statute as to liability of shippers in local commerce, it would be necessary for the defendant to plead in its answer either that there was a special contract, or facts showing that there was a special contract, but on the contrary, the defendant here shows in its answer that "said sheep were consigned to said plaintiff under the Uniform Livestock Contract," R. 12, thus negativing any idea of a special contract.

There could not be any special contract here as to price.

"A common carrier must not give preference in time, price, or otherwise to one person over another, * * *."

Rev. Codes Montana, 8-703, 1947.

The railway counsel seem to claim that it was breaking the law. We deny that our client was a particeps criminis.

There is no suggestion that by paying an increased rate the claimed limitations on carrier's liability would have been discarded. There was, in short, no "option or opportunity" afforded the shipper. If such a bill of lading was available, then it was incumbent upon the appellee to bring it to light.

"A railroad company engaged in the business of common carrier is bound, under the common law, to receive and carry, within the class of goods it is engaged in carrying, such as are tendered for that purpose, and, in the absence of a special contract, to carry them with the full common law liability of a common carrier. And under the law as established by the great weight of authority, when a shipper goes to a carrier with a view of making a shipment, and the carrier has different kinds of contracts, one by which the carrier insures the goods shipped, and the other by which the shipper assumes all risk, it it incumbent upon the carrier to show the contract actually made. The mere fact, however, that the railroad company accepts the goods and agrees to ship them is not a sufficient consideration for the waiver on the part of the shipper of the carrier's liability as insurer. There must be some other consideration such as a reduced rate, because under the common law it is the duty of the railroad company to ship goods tendered, and of a class which it carried; and the mere fact that it accepts goods and agrees to ship them is not a consideration which will

> support a contract whereby the carrier is relieved from its common law liability for damages resulting to the goods received. We think this doctrine is based upon reason; and, while the courts of the United States are very much divided upon the question of the liability of a common carrier, under a special contract limiting liability, and are not uniform in their holdings, yet we are inclined to the opinion that where a common carrier seeks to relieve itself from a common-law liability, it is incumbent upon the carrier to show that there was a consideration for the exemption claimed."
>
> McIntosh v. Oregon Railroad & Navigation Company, 17 Idaho 100; 105 Pac. 66.

The appellant argues that the rate charge made was for shipment under conditions and limitations imposed by the contract. In support thereof, it cites the Montana case of Rose v. Northern Pacific Railway Company, 35 Mont. 70; 88 Pac. 767. We cannot agree with appellant's interpretation of that case, or that it applies here. Therein the plaintiff received a pasenger ticket at a reduced rate in consideration of which the carrier's liability for her baggage was limited to $100.00. In a suit instituted to recover $1,775.00, the alleged value of certain baggage, it was held the reduced fare was an adequate consideration to sustain the stipulation as to liability.

Judge Dobie of the 4th Court of Appeals, in his work on Bailments and Carriers, page 380, has this to say:

> "The contract limiting the carrier's liability must possess the ordinary elements of contractual validity, and, to be effectual, must hence be supported by a consideration. But as common carriers are bound, owing to their public profession, to carry without any contract limiting their liability, their mere agreement

to carry does not furnish any consideraiton for a contract to limit their liability. In order, therefore, that such contracts must be valid, some other consideration must be found, moving from the carrier to the shipper."

(b) IF THERE HAD BEEN A SPECIAL CONTRACT, THE CARRIER WOULD STILL BE LIABLE UNDER THE EVIDENCE.

Subject to certain exceptions the common law and statutory liability of a common carrier of livestock is that of an insurer. The recognized exceptions are those losses or injuries resulting from (a) an Act of God; (b) the public enemy; (c) the negligence or wrongful act of the shipper, and (d) the peculiar nature and propensities of the animals. (13 C. J. S., 131 et seq.)

While it is true that this liability can be limited by a special contract, the effect of the special contract is merely to create and define certain cases and conditions under which its full common law liability shall not attach. And when the carrier seeks to escape liability on the ground that the loss of, or injury to, the chattels was due to causes as to which it is exempt under its contract, the burden of proof rests upon the carrier to bring such loss or injury within its contractual exception.

Dobie on Bailments and Carriers, P. 388;

Nelson v. Great Northern Railway Company, 28 Mont. 297; 72 Pac. 642.

If it were conceded that the shipment was made pursuant to the terms of the bill-of-lading, we fail to see how it improves or alters the position of appellant. By Section 1-(a) of its contract, R. 13, the carrier is excused from

liability, unless its negligence is a contributing factor, for "any loss thereof or damage thereto, or delay caused by the Act of God, the public enemy, quarantine, the authority of law, the inherent vice, weakness, or natural propensity of the animal, or the act or default of the shipper or owner, or the agent or either, or by riots, strikes, stoppage of labor or threatened violence." These are the very things, quarantine alone excepted, which the carrier is already protected from by the common law and Montana Statute. Section 1-(b), R. 14, excuses the carrier, unless caused by its negligence, for "overloading, crowding upon one another, escaping from cars, pens, or vessels, kicking or goring, or otherwise injuring themselves or each other, suffocation, fright or fire caused by the shipper or the shipper's agent, heat or cold, changes in the weather or delay caused by stress of weather or damage to or obstruction of track or other causes beyond the carrier's control." Here again, we find, the exceptions are in the nature of the inherent weaknesses or propensities of the animals, the fault of shipper or the Act of God. Section 4-(a), R. 14, charges shipper with the responsibility of loading and unloading. It is obvious that this section does not afford a shield. The loss sustained by appellee was not in the process of loading or unloading.

Stripped of its repetition and surplusage, we therefore find that the carrier's contract in this instance did not confer any other defense than that to which it was already entitled by the common law and statute. If we read the appellant's brief correctly, it is the inherent defect defense upon which it relies.

According to the weight of authority where it is shown that livestock not accompanied by the shipper was de-

livered to the carrier in a good condition and was received at its destination in bad condition the burden is on the carrier to show that the loss or injury was not the result of its negligence.

13 C. J. S. 551;
Dobie on Bailments and Carriers, p. 347.

The sheep were in good condition when loaded. R. 89, 94. It was admitted by the appellant that they were received by it "in apparent good order." R. 45, 121.

The effect of appellant's written admission of "apparent good order" is of importance. Such receipt is prima facie evidence of their condition. This is especially true with respect to all circumstances which were open to inspection and visible.

9 Am. Jr., Sec. 422, page 679.

The District Court found from the evidence that the livestock were loaded in good condition. Finding VIII, R. 23.

The sheep were in bad condition when received. They were down, piled on each other, badly tromped and hurt. R. 46. They were down badly in the north ends of every car. R. 49, 102.

Such was the court's finding. Finding V. R. 21.

To overcome this prime facie case, and to fix the blame upon the natural propensities of the sheep, the appellant produced its employees who helped load at Kevin and who accompanied the shipment to Wickes. Each bore faithful testimony to a careful, smooth journey, with no rough handling or sudden stops. R. 139, 146, 154, 165.

Each conductor inspected the shipment during his tour of duty, and found everything in good order. R. 140, 145, 150, 151, 159.

"Sheep O. K." at Powell. R. 147.

"Nothing wrong at Wolf Creek." R. 150.

Sheep seen in daylight at Helena; nothing wrong R. 151, 158.

Even at Wickes, we are told by appellant's agents that there was nothing wrong. R. 153. "Nothing out of the ordinary." R. 159.

If the sheep arrived in the good condition attested by these witnesses, why then did it behoove appellant to explain the cause of appellee's losses—losses not seriously questioned—by its theory of inherent defect?

To support its hypothesis of inherent defect the appellant produced one witness Dr. Harold L. Nordell, a licensed veterinarian. We believe his testimony so far as material can be fairly summarized as follows: That if sheep were loaded wet or become wet during shipment there would be the hazard of exposure with possible resulting respiratory illness. R. 171. That sheep are easily frightened, they identify their lambs by scent and that if transported 200 miles and if throughout "were roughly handled," it would have killed a number of them. R. 174, 175. On cross examination he admitted that if the sheep were loaded dry, with intermittent showers throughout, and no piling or rough handling, the loss sustained by appellee could not thus be explained. R. 176, 177.

We are left to speculate as to the animal propensity or defect to which we can assign the loss. The doctor does

not venture an opinion—in passing it is to be noted that his examination was conducted eleven days after the shipment arrived, R. 169—but he does suggest that the damage which manifested itself in the form of "bum lambs" was due to loss of scent. With that we have no argument, but loss of scent hardly explains the death of 58 ewes or 149 lambs.

The explanation for this loss if one is needed is to be found in the following: The train was four hours forty-five minutes late in leaving Great Falls; R. 134; it usually arrived at Wickes between 9 and 10 A. M.; R. 135, on the morning in question it arrived at 10:30 A. M. R. 129. Therefore, we find that on the run between Great Falls and Wickes it made up approximately three hours to three hours thirty minutes of the lost time. This would indicate an unusual, if not excessive, speed. Helena was the last stop before Wickes. Between Helena and Wickes there is a 2.2 grade. R. 79, 154. At Wickes the sheep were piled in the ends of the cars. The speed or jerking on the grade doubtless was the cause of the trouble.

The appellee was waiting to receive his sheep at Wickes. For what then transpired we quote from the testimony, on direct, of the conductor:

> "A. When I got there, I met Mr. Melton. I didn't know who he was at that time; I didn't know he was Mr. Melton. He was pretty well put out when I told him I couldn't unload them, just set them out and go. He was pretty mad and wanted me to stop and unload them. If I can remember, he wanted one certain car spotted. He said if he could get that one spotted, it wouldn't be so bad. That is the way I remember.

Q. Did you explain to Mr. Melton the reason why you could not delay your train?

A. I told him I had a message from the dispatcher to set them out and go.

Q. At that time, Mr. Marceau, was anything said to you, or did you note any condition of the stock in the cars?

A. I didn't notice any piled up or anything. We generally move so much that we wouldn't pay much attention to them. All I did was get the stuff set out and get out of town." R. 152.

And from the cross-examination of the same witness:

"Q. He was making some complaint about the condition of the sheep?

A. He was complaining plenty about us not unloading them.

Q. He wanted you to spot the cars, is that correct?

A. That's right.

Q. Which you refused to do?

A. I didn't refuse, I told him my instructions said not to.

Q. You failed to do it?

A. I didn't do it." R. 156.

Thus it appears the appellant was fully advised, at Wickes, that something was seriously wrong. It did not deign to investigate or assist; rather the cars were put on a siding with an even steeper grade and left there for an hour and twenty minutes until an extra was sent from Butte to provide the power for unloading. Having discovered the condition of the animals at Wickes, it was then the duty of appellant to do everything possible to minimize the loss.

Even when the loss is caused by one of the excepted perils against which the common carrier is not an insurer,

he is nevertheless liable, if he fails to use reasonable care either to avoid such peril or to minimize the loss after the goods are actually exposed to the peril. The carrier escapes liability only when the loss or damage is due to an excepted peril without any concurring negligence on his part.

Dobie on Bailments and Carriers, page 324, 341;

Beard v. Illinois Cent. Ry. Co., 44 N. W. 800, 79 Iowa, 518.

This rule has been adopted in Montana:

"The company were bound to take notice of the signs of approaching danger, and, if of such a character as reasonably to awaken apprehension at a time when the facilities and means of escape from the danger were within their control, they were bound to use such means for the safety of the property entrusted to their care."

Nelson vs. Great Northern Railway Co., 28 Mont. 297; 72 Pac. 642.

"It is wrongful to refuse to lay out a car for unloading at request of shipper when cattle are suffering."

Johnson v. Alabama Ry., 69 Miss. 191; 11 So. 104.

"It is gross negligence for a conductor to refuse to supply water to hogs after being requested by owner."

Ill. Central Ry. Co. v. Adams, 42 Ill. 472;

Lindsley v. Chicago, etc. Ry. Co., 36 Minn. 539.

The fact that shipper overcrowded cars does not relieve carrier of duty to prevent death by applying water when animals are overheated.

9 Am. Jur. p. 714.

CONCLUSION

Instead of reviewing this brief, we feel that an appropriate conclusion is written by the Supreme Court of Montana:

> "Appellant's contention is that, having presented testimony tending to exonerate it from negligence, the presumption was overcome in the absence of a further showing by the respondent, and a verdict should have been directed accordingly. This is untenable. When a presumption of this character is confronted with testimony in the opposite direction, the result is a conflict of evidence which the jury must resolve. (Rev. Codes, Sec. 8028, subd. 2; Freeman v. Chicago, M. & St. P. Ry. Co., 52 Mont. 1; 154 Pac. 912; Emerson v. Butte Electric Ry. Co., 46 Mont. 454; 129 Pac. 319."
>
> Johnson v. Chicago, Milwaukee, etc. Ry. Co., 52 Mont. 73; 155 Pac. 971.

We respectfully submit that the judgment should be affirmed.

LEONARD A. SCHULZ,
Dillon, Montana;

H. L. MAURY,
Butte, Montana;

A. G. SHONE,
Butte, Montana,
Attorneys for Appellee.